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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

IN RE JAMES A. BAKER, III, SECRETARY OF THE TREASURY, AND JAMES I. OWENS, ACTING COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE HONORABLE ROBERT L. CARTER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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9pp

QUESTION PRESENTED

Whether various individuals and organizations have standing, on the basis of their status as clergy or voters, to sue the government for declaratory and injunctive relief requiring the government to revoke the tax exemption of the Roman Catholic Church.

PARTIES TO THE PROCEEDING

Abortion Rights Mobilization Inc., Lawrence Lader, Harold W. Bostrom, Margaret O. Strahl, M.D., Helen W. Edey, M.D., Ruth P. Smith, National Women's Health Network, Inc., Long Island National Organization for Women-Nassau Inc., Rabbi Israel Margolies, Reverend Bea Blair, Rabbi Balfour Brickner, Reverend Robert Hare, Reverend Marvin G. Lutz, Laurel Clinic, Inc., Milan M. Vuitch, M.D., Women's Center for Reproductive Health, The Federation of Feminist Women's Health Centers, Inc., Harrisburg Reproduction Health Services, Inc., Hagerstown Reproductive Health Services, Inc., Women's Health Services, Inc., Jane C. Delgado, Jennie Rose Fifrieri, Eileen Walsh, Patricia Sullivan Luciano, Marcella Michalski, Chris Niebrzydowski, Judith A. Seibel, Karen DeCrow and Susan Sherer are plaintiffs in the district court and are respondents here under Rule 27.2(b) of the Rules of this Court.

TABLE OF CONTENTS

	Page
Opinions below	2
Jurisdiction	2
Constitution and statutory provisions involved	2
Statement	2
Reasons for granting the petition	3
Conclusion	4

TABLE OF AUTHORITIES

Cases:

De Beers Consolidated Mines Ltd. v. *United States*, 325 U.S. 212	3
Maryland v. *Soper*, 270 U.S. 9	3
United States Alkali Export Ass'n v. *United States*, 325 U.S. 196	3

Constitution, statute and rule:

U.S. Const. Art. III, § 2	2
28 U.S.C. 1651(a)	2, 3
Sup. Ct. R. 26	3

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The Solicitor General, on behalf of James A. Baker, III, Secretary of the Treasury and James I. Owens, Acting Commissioner of Internal Revenue, petitions for a writ of prohibition or mandamus* directed to the United States District Court for the Southern District of New York and the Honorable Robert L. Carter, judge of said court.

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* There is little practical difference between the two writs of mandamus and prohibition. See 16 C. Wright & A. Miller, *Federal Practice and Procedure* § 3932, at 206-207 (1977). Like mandamus, its more familiar counterpart, the writ of prohibition "is directed against unwarranted assumptions of jurisdiction or excesses of it." *Ex parte United States,* 263 U.S. 389, 393 (1923). In this case, the label to be affixed to the writ depends upon whether the appropriate relief is viewed as prohibiting the district court from proceeding to hear this case or, alternatively, ordering the district court to dismiss the case. In either event, issuance of the writ requires consideration of the same factors, and the precise label attached to the writ does not matter. See *Ex parte Simons,* 247 U.S. 231, 239-240 (1918). For convenience, we will use the term "mandamus" to refer to mandamus or prohibition.

OPINIONS BELOW

The opinions below are described at page 1 of the petition in *Baker* v. *Abortion Rights Mobilization, Inc.*, filed today, and the opinions are set forth in the appendix to that petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a) and Rule 26 of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, of the Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT

The statement of the case is set forth at pages 2-10 of the petition in *Baker* v. *Abortion Rights Mobilization, Inc.*, *supra*.

REASONS FOR GRANTING THE PETITION

In our petition in *Baker* v. *Abortion Rights Mobilization, Inc., supra,* we explain that the district court manifestly and seriously erred in denying the government's motion to dismiss the complaint in this case for lack of standing. As explained in detail in that petition, the district court's determination to proceed to trial in this case amounts to a judicial usurpation of power that warranted the issuance of a writ of mandamus by the court of appeals. If this Court determines that certiorari should not be granted, the reasons set forth in the petition for that writ fully justify the issuance of a writ of mandamus directly by this Court pursuant to 28 U.S.C. 1651(a) and Rule 26 of the Rules of this Court. This Court has repeatedly recognized that, where a court has exceeded the limitations on its power in a manner seriously affecting the public interest and a remedy through the appellate process in unavailable, it is appropriate for this Court to issue an extraordinary writ. See, *e.g., De Beers Consolidated Mines Ltd.* v. *United States,* 325 U.S. 212 (1945); *United States Alkali Export Ass'n* v. *United States,* 325 U.S. 196 (1945); *Maryland* v. *Soper,* 270 U.S. 9 (1926). If the district court's determination to proceed to trial in this case in contravention of the limitations on its jurisdiction contained in Article III of the Constitution and expressed in this Court's decisions cannot be corrected by any other means, this Court should issue a writ of mandamus directing the district court to dismiss the action.

CONCLUSION

The petition for a writ of mandamus or prohibition should be considered with the petition for a writ of certiorari filed today in *Baker* v. *Abortion Rights Mobilization, Inc., supra.* If the relief sought by the government in that certiorari petition is not granted pursuant to that petition or in the related proceedings described in that petition, the petition for a writ of mandamus or prohibition should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JULY 1986

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